

E-Filed 5/16/06

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICROSOFT CORPORATION,
Plaintiff,
v.
SUNCREST ENTERPRISE, et al.,
Defendants.

Case Number C 03-5424 JF (HRL)
ORDER RE CROSS-MOTIONS FOR
SUMMARY JUDGMENT
[Doc. Nos. 100, 119, 121]

Plaintiff Microsoft Corporation (“Microsoft”) moves for summary judgment of its claims against Defendants Suncrest Enterprise (“Suncrest”) and Yi-Ling Chen (“Chen”). Suncrest and Chen have filed cross-motions for partial summary judgment. Each parties’ motion will be granted in part and denied in part, as set forth below.

I. BACKGROUND

Microsoft develops, distributes and licenses computer software programs. Prior to ceasing operations, Suncrest was a “middleman” that bought and resold computer goods. Chen has been the sole shareholder, owner and officer of Suncrest since its incorporation.

1 First Test Purchase

2 Microsoft sometimes sends undercover investigators to purchase products from
3 wholesalers who carry Microsoft products. In September 2001, one such investigator made a test
4 purchase from Suncrest of four units of Microsoft Windows 98. All four units turned out to be
5 counterfeit. Microsoft did not inform Suncrest of its discovery or take any further action at that
6 time.

7 Surprise Inspection Of Suncrest Warehouse

8 Almost one year later, on August 2, 2002, one of Microsoft's attorneys, Erik Blank
9 ("Blank"), made an unscheduled visit to Suncrest, accompanied by law enforcement officers.
10 Chen allowed Blank and the officers to enter Suncrest's warehouse and inspect Suncrest's entire
11 inventory of approximately 100 Microsoft products. Blank told Chen that all of the products
12 were genuine.

13 Microsoft's August 2002 Letter To Suncrest

14 Shortly thereafter, on August 23, 2002, Microsoft sent Suncrest a four-page letter that was
15 friendly in tone but that also made clear that Microsoft would not tolerate even inadvertent sales
16 of counterfeit products. Exh. 36 to Chen Depo, Aug. 2002 Letter. The letter referenced the prior
17 test purchase of counterfeit products by a Microsoft investigator, stated that Suncrest had been
18 the subject of a large number of calls to Microsoft's anti-piracy hotline, stated that Suncrest had
19 received a previous warning letter,¹ and cautioned Suncrest to "take every reasonable step to
20 avoid software copyright infringement in the future." *Id.* at p. 2. The letter suggested that
21 Suncrest guard against inadvertent purchases of suspect products by purchasing from a list of
22 "Authorized Distributors" of Microsoft products. *Id.* at p. 3. The letter stated, however, that
23 Suncrest "may always purchase genuine, properly channeled software from any legitimate
24 source. Purchasing from authorized sources is purely voluntary and is suggested only as a means
25 of ensuring authenticity." *Id.*

26
27
28 ¹ The date of such letter is not provided, and there does not appear to be any other
reference to such prior warning letter in the record before the Court.

1 present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e);
 2 *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents
 3 evidence from which a reasonable jury, viewing the evidence in the light most favorable to that
 4 party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49;
 5 *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir. 1991).

6 **III. DISCUSSION**

7 Microsoft seeks summary judgment that Suncrest is liable for copyright infringement,
 8 trademark infringement, false designation of origin and unfair competition³; that Suncrest's
 9 principal, Chen, is personally liable on these claims; and that Microsoft is entitled to the
 10 maximum allowable statutory damages for non-willful infringement of its copyright and
 11 trademarks, as well as costs and attorneys' fees and permanent injunctive relief.

12 Suncrest and Chen seek summary judgment of Microsoft's claims for constructive trust
 13 and accounting. Suncrest additionally seeks summary judgment that Microsoft's request for a
 14 permanent injunction is moot because Suncrest is defunct. Finally, Chen seeks summary
 15 judgment that she cannot be held personally liable with respect to Microsoft's claims for
 16 trademark infringement, false designation of origin, unfair competition, constructive trust or
 17 accounting (she does not make this motion with respect to Microsoft's claim for copyright
 18 infringement).

19 **A. Evidentiary Issues**

20 As an initial matter, the Court concludes that the undisputed evidence in the record
 21 establishes that Suncrest sold four counterfeit Windows 98 products in 2001 and one counterfeit
 22 Microsoft COA in 2003. Suncrest and Chen assert that the evidence is insufficient to establish
 23 that they in fact sold these counterfeit products. First, Defendants note that Steve Schlanger
 24 ("Schlanger"), the investigator who made the purchases, states that when he received shipment of
 25 the products he opened the boxes to confirm the contents and then shipped the software "to a
 26

27 ³ Microsoft's claims appear to be based solely upon the 2001 sale of the Windows 98
 28 products, and not on the 2003 distribution of the counterfeit COA. Presumably, evidence of the
 counterfeit COA is presented to strengthen Microsoft's arguments that Suncrest acted recklessly
 in distributing counterfeit Microsoft products.

Microsoft representative.” Schlanger ¶¶ 5, 7. Schlanger does not identify the Microsoft representative, does not provide dates of shipment and does not specify where the products were shipped.

Microsoft submits a declaration from one of its employees, Kristi Bankhead (“Bankhead”), whose duties include analyzing software samples to determine whether the software is counterfeit. Bankhead Decl. ¶ 8. Bankhead states that she examined four units of Microsoft Windows 98 obtained by an investigator from Suncrest in October 2001,⁴ as well as a Windows 98 COA obtained by an investigator from Suncrest in October 2003. *Id.* ¶¶ 11, 14. She states that she found the products to be not genuine. It appears clear from a comparison of the two declarations that Bankhead examined the same products purchased by Schlanger. However, Defendants point out that Bankhead does not state when she examined the software or establish a chain of custody between the time of purchase and the date of examination.

While the it could wish for more specificity in the declarations of Microsoft’s witnesses, the Court concludes that the declarations of Schlanger and Bankhead are sufficient to meet Microsoft’s initial burden of demonstrating that the counterfeit software was purchased from Suncrest. The fact that the declarants failed to dot every “i” and cross every “t” certainly opens the door for Defendants to present evidence that the products in question were *not* purchased from Suncrest. However, Suncrest presents no evidence suggesting as much. Accordingly, the Court concludes that any reasonable trier of fact confronted with this record would conclude that the four counterfeit Windows 98 products and the counterfeit COA in fact were purchased from Suncrest.

B. Copyright Infringement

1. Liability

A claim of copyright infringement requires a showing of two elements: (1) the plaintiff has a valid copyright in the work and (2) the defendant infringed the copyright. *Island Software and Computer Service, Inc. v. Microsoft Corp.*, 413 F.3d 257, 260 (2d Cir. 2005). Microsoft has

⁴ The investigator stated that the actual date of purchase was in September 2001.

1 submitted its copyright registration certificate for the Windows 98 software, and there is no
2 dispute that Microsoft has a valid copyright in that software. Sale of unauthorized copies of a
3 work constitutes copyright infringement. *Id.* at 261. Accordingly, based upon the undisputed
4 evidence that Suncrest sold counterfeit Windows 98 software in 2001, Microsoft has established
5 Suncrest's liability for copyright infringement.

6 With respect to Chen, there are three possible theories of liability: direct infringement,
7 contributory infringement and vicarious liability. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th
8 Cir. 2004). "To prove a claim of direct copyright infringement, a plaintiff must show that he
9 owns the copyright and that the defendant himself violated one or more of the plaintiff's
10 exclusive rights under the Copyright Act." *Id.* To prove a claim of contributory infringement, a
11 plaintiff must show that the defendant, with knowledge of the infringing activity, "induces,
12 causes or materially contributes to the infringing conduct of another." *Id.* (internal quotation
13 marks and citation omitted). To prove a claim of vicarious liability, a plaintiff must show that
14 the defendant "enjoys a direct financial benefit from another's infringing activity and has the
15 right and ability to supervise the infringing activity." *Id.* (internal quotation marks and citation
16 omitted).

17 Microsoft asserts theories of contributory infringement and vicarious liability against
18 Chen. The Court concludes that Microsoft has not carried its burden of establishing contributory
19 infringement, that is, that Chen knew or should have known of Suncrest's infringing conduct and
20 induced, caused or materially contributed to such conduct. However, the Court concludes that
21 Microsoft has carried its burden of establishing that Chen is vicariously liable for Suncrest's
22 infringement based upon a showing that Chen enjoyed direct financial benefit from Suncrest's
23 infringing activity and had the right and ability to supervise such activity. It is undisputed that
24 Chen was the sole shareholder of Suncrest at the time in question; accordingly, she reaped the
25 financial benefit of all of Suncrest's sales, including sales of counterfeit goods. It likewise is
26 undisputed that Chen founded Suncrest, was its Chief Executive Officer (indeed, its sole officer),
27 and its sole shareholder. Chen worked daily at Suncrest, was responsible for all hirings and
28 firings, and her directions were followed by the sales department. She admits in her declaration

1 that she gave “clear” directions to the sales department to purchase Microsoft products only from
2 reputable vendors, and recites a number of facts demonstrating her knowledge of Suncrest’s sales
3 practices. Chen Decl. ¶ 2. Knowledge of the infringing activity is not an element of vicarious
4 liability; the doctrine is premised upon the theory that an individual who is in a position to police
5 the conduct of a direct infringer, and whose economic interests are entwined with that of the
6 direct infringer, should be held jointly liable for the infringement. *Fonovisa, Inc. v. Cherry*
7 *Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996). Accordingly, the Court will grant Microsoft’s
8 motion for judgment of liability against Chen personally on the copyright claim.

9 **2. Statutory Damages**

10 A copyright owner may elect, at any time before final judgment is rendered, to recover
11 “instead of actual damages and profits, an award of statutory damages for all infringements
12 involved in the action.” 17 U.S.C. § 504(c)(1). If a plaintiff makes this election, the court has
13 discretion to award any amount between \$750 and \$30,000 for each copyright infringed. *Id.*;
14 *Island Software*, 413 F.3d at 262-63. If the defendant’s infringement was willful, the court in its
15 discretion may enhance the award to as much as \$150,000 per copyright infringed. 17 U.S.C. §
16 504(c)(2); *Island Software*, 413 F.3d at 263. Here, Microsoft seeks the maximum allowable
17 damages for non-willful infringement, that is, \$30,000 for infringement of the copyright in the
18 Windows 98 software.

19 Although Microsoft is not seeking damages for willful infringement, Microsoft argues
20 that Defendants in fact acted willfully, or at least recklessly, and on this basis seeks an award of
21 the maximum allowable statutory damages for non-willful infringement. After reviewing the
22 record as a whole, the Court concludes that an award of \$30,000 would be grossly
23 disproportionate to the offense. The vast majority of Suncrest’s business was in computer
24 hardware; at most, software sales made up only two or three percent of total sales. Chen Decl. ¶
25 2. Suncrest is not accused of producing the counterfeit products at issue; Suncrest purchased
26 those goods from third parties and resold them in the normal course of business. *Id.* at ¶ 5.

27 While the evidence demonstrates that four Windows 98 products purchased by an
28 investigator in 2001 turned out to be counterfeit, there is no evidence that Suncrest knew the

1 products were counterfeit. Moreover, there is no evidence that Microsoft informed Suncrest that
2 the products were counterfeit at the time of purchase. Microsoft did nothing for approximately
3 one year, at which time it made a surprise visit to Suncrest's warehouse, accompanied by law
4 enforcement officers. Although not legally obligated to do so, Suncrest allowed Microsoft's
5 representative and the law enforcement officers to examine all Microsoft products in the
6 warehouse, and all were determined to be genuine. Microsoft subsequently made a second test
7 purchase from Suncrest, and received genuine Microsoft products. Approximately two years
8 after the test purchase which resulted in the counterfeit products, Microsoft made a third test
9 purchase, and received genuine Microsoft products but a counterfeit COA. Far from suggesting
10 that Suncrest was intentionally or recklessly distributing counterfeit software products, these
11 facts suggest that Suncrest was a legitimate business and that a few counterfeit products slipped
12 through.

13 Microsoft makes much of the fact that Suncrest continued to purchase Microsoft products
14 from "unauthorized" dealers even after receipt of Microsoft's August 2002 letter providing a list
15 of "authorized" dealers. However, examination of the letter itself reveals that Suncrest was *not*
16 told that it was required to purchase from "authorized" dealers, but rather was told that it "may
17 always purchase genuine, properly channeled software from any legitimate source. Purchasing
18 from authorized sources is purely voluntary and is suggested only as a means of ensuring
19 authenticity." Exh. 36 to Chen Depo, Aug. 2002 Letter. The recent surprise inspection of
20 Suncrest's warehouse had revealed that all Microsoft products were genuine. Accordingly,
21 Suncrest's continued purchase of Microsoft products from businesses it considered legitimate
22 does not constitute evidence of willfulness or recklessness even though such businesses were not
23 on Microsoft's list of "authorized" dealers. Suncrest provides the declaration of its principal,
24 Chen, who states that Suncrest has never been accused of or sued for selling counterfeit products
25 with the exception of this case; that Suncrest dealt with companies it believed to be reputable;
26 that Suncrest paid fair market prices for the Microsoft software products; and that Suncrest chose
27 these smaller dealers because Microsoft's "authorized" distributors are large companies that
28 prefer to sell in larger quantities than Suncrest could handle. Chen Decl. ¶¶ 7, 10, 14, 16.

1 As noted above, and conceded by the parties at the hearing, it is the Court's responsibility
2 to determine statutory damages under the Copyright Act. Given that the total purchase price of
3 the Windows 98 products was \$340, and absent evidence of willful or reckless conduct on the
4 part of Suncrest, the Court concludes that an award of \$5,000 is appropriate for the copyright
5 infringement in this case.

6 **3. Costs And Attorneys' Fees**

7 Under the Copyright Act, the court in its discretion may award costs and attorneys' fees
8 to the prevailing party. 17 U.S.C. § 505; *Historical Research v. Cabral*, 80 F.3d 377, 378 (9th
9 Cir. 1996). Such recovery is not automatic, but exceptional circumstances are not required
10 before attorneys' fees are awarded. *Historical Research*, 80 F.3d at 378. "[D]istrict courts may
11 freely award fees, as long as they treat prevailing plaintiffs and prevailing defendants alike and
12 seek to promote the Copyright Act's objectives." *Id.* "District courts should consider, among
13 other things, the degree of success obtained; frivolousness; motivation; objective
14 unreasonableness (both in the factual and legal arguments in the case); and the need in particular
15 circumstances to advance considerations of compensation and deterrence." *Id.* at 379 n.1
16 (internal quotation marks and citation omitted).

17 As discussed above, the record does not demonstrate willful or reckless conduct on the
18 part of Suncrest. However, the copyright violation did occur, and Microsoft was put to the
19 trouble and expense of bringing this action. While Microsoft has not recovered all of the relief it
20 sought, it has obtained an adjudication of liability and a not insignificant award of damages. The
21 Court therefore is inclined to award reasonable attorneys' fees and costs in an amount not to
22 exceed \$30,000. The Court will direct Microsoft to file a declaration detailing the fees and costs
23 expended in prosecuting its copyright claim.

24 Accordingly, the Court will grant Microsoft's motion for summary judgment against
25 Suncrest and Chen on the copyright claim, and will award statutory damages in the amount of
26 \$5,000, as well as reasonable costs and attorneys' fees, not to exceed \$30,000.

27 **4. Injunctive Relief**

28 A copyright owner may obtain an injunction upon demonstrating a threat of continuing

infringement. *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994). Here, the record demonstrates that Suncrest is defunct, and has maintained limited viability solely for the purpose of defending this action. Accordingly, the Court will deny Microsoft's motion with respect to injunctive relief.

C. Trademark Infringement

1. Liability

Microsoft may establish a trademark infringement claim under the Lanham Act by demonstrating that Suncrest used in commerce a counterfeit of Microsoft's mark in a manner like to cause customer confusion. 15 U.S.C. 1114(1); *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999). Microsoft's registration of its "MICROSOFT" and "WINDOWS" marks constitutes *prima facie* evidence of the validity of the marks and of the Microsoft's exclusive right to use the marks. 15 U.S.C. § 1115(a); *Brookfield*, 174 F.3d at 1047. Accordingly, based upon the undisputed evidence that Suncrest sold counterfeit Microsoft Windows 98 products in 2001, Microsoft has established Suncrest's liability for infringement of the "MICROSOFT" and "WINDOWS" marks.

Microsoft asserts that Chen is contributorily liable for Suncrest's trademark infringement, citing *Monsanto Co. v. Haskel Trading*, 13 F.Supp.2d 349 (E.D.N.Y. 1998) for the proposition that "[w]hile a corporate officer is not necessarily individually liable for torts committed on behalf of the corporation, personal liability for trademark infringement and unfair competition is established if the officer is a moving, active conscious force behind the defendant corporation's infringement." *Id.* at 354 (internal quotation marks and citations omitted). However, the evidence in the record is that while Chen certainly had authority to give direction to the sales department, she did not personally participate in purchasing decisions outside of instructing the sales department to purchase from established, reputable vendors. Chen Decl. ¶¶ 2, 8-12. Accordingly, the Court concludes that Chen is entitled to judgment that she is not personally liable for trademark infringement.

2. Statutory Damages

A trademark owner may elect, at any time before final judgment is rendered, to recover

1 statutory damages instead of actual damages for use of a counterfeit mark. 15 U.S.C. § 1117(c).
2 If a plaintiff makes this election, the court has discretion to award any amount between \$500 and
3 \$100,000 per counterfeit mark. *Id.* If the defendant's infringement was willful, the court in its
4 discretion may enhance the award to as much as \$1,000,000 per counterfeit mark. *Id.* Here,
5 Microsoft seeks the maximum allowable damages for non-willful infringement, that is, \$200,000
6 for infringement of the marks "MICROSOFT" and "WINDOWS."

7 For the same reasons discussed above with respect to Microsoft's claim of copyright
8 infringement, the Court concludes that an award of \$200,000 would be grossly disproportionate
9 to the offense. As noted above, and conceded by the parties at the hearing, it is the Court's
10 responsibility to determine statutory damages under the Lanham Act. Given that the total
11 purchase price of the Windows 98 products was \$340, and absent evidence of willful or reckless
12 conduct on the part of Suncrest, the Court concludes that \$5,000 is an appropriate award for each
13 trademark violation, for a total of \$10,000 for violation of the "MICROSOFT" and
14 "WINDOWS" trademarks.

15 Accordingly, the Court will grant Microsoft's motion for summary judgment against
16 Suncrest on the trademark infringement claim, and will award statutory damages in the amount
17 of \$10,000. The Court will deny Microsoft's motion for summary judgment against Chen on the
18 trademark infringement claim, and will grant Chen's cross-motion on this claim.

19 **3. Costs And Attorneys' Fees**

20 Under the Lanham Act, the court in its discretion may award attorneys' fees to the
21 prevailing party in "exceptional cases." 15 U.S.C. § 1117(a). As discussed above, the record
22 does not demonstrate willful or reckless conduct on the part of Suncrest. Accordingly, the Court
23 concludes that this is not an exceptional case warranting an award of attorneys' fees under the
24 Lanham Act.

25 **D. False Designation Of Origin**

26 "A claim for false designation of origin under section 43 of the Lanham Act arises when a
27 person uses in commerce a word, term, name or symbol, or a false or misleading description or
28 representation of fact which is likely to cause confusion or to deceive as to the origin,

1 sponsorship or approval of goods.” *Microsoft Corp. v. Compusource Distributors, Inc.*, 115
 2 F.Supp.2d 800 (E.D. Mich. 2000) (citing 15 U.S.C. § 1125(a)(1)). Distribution of the counterfeit
 3 Microsoft Windows 98 products establishes Suncrest’s liability for false designation of origin.
 4 *See id.*

5 The same standards governing individual liability for trademark infringement govern
 6 individual liability for false designation of origin. *Bambu Sales, Inc. v. Sultana Crackers, Inc.*,
 7 683 F.Supp. 899, 913-14 (E.D.N.Y. 1988). The Court therefore will grant Microsoft’s motion
 8 for summary judgment against Suncrest on the claim of false designation of origin, but will deny
 9 Microsoft’s motion against Chen on this claim and will grant Chen’s cross-motion for summary
 10 judgment on the claim of false designation of origin.

11 **E. Unfair Competition Under State Law**

12 California’s Unfair Competition Law defines “unfair competition” to include “any
 13 unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading
 14 advertising.” Cal. Bus. & Prof. Code § 17200. “The Legislature intended this sweeping
 15 language to include anything that can properly be called a business practice and that at the same
 16 time is forbidden by law. *Bank of the West v. Sup. Ct.*, 2 Cal.4th 1254, 1266 (1992) (internal
 17 quotation marks and citation omitted). To state a claim under the UCL, a plaintiff need not plead
 18 all the traditional elements of a tort; instead, the plaintiff need show only “that members of the
 19 public are likely to be deceived.” *Id.* at 1267 (internal quotation marks and citation omitted).
 20 Under this broad definition, Suncrest is liable under California’s UCL based upon its distribution
 21 of counterfeit Microsoft products.

22 With respect to Chen, Microsoft again argues that she authorized or directed the
 23 infringing conduct. However, as discussed above, the record does not demonstrate that Chen
 24 actually directed the purchase and resale of the infringing products, only that she had *authority*
 25 over those who did so. While this authority is sufficient to render Chen individually liable for
 26 copyright infringement, it is not sufficient to render her individually liable for unfair competition.
 27 Accordingly, the Court will grant Microsoft’s motion for summary judgment against Suncrest on
 28 the unfair competition claim, but will deny Microsoft’s motion for summary judgment against

1 Chen on this claim and will grant Chen's cross-motion for summary judgment on the unfair
2 competition claim.

3 **F. Constructive Trust And Accounting**

4 Suncrest and Chen argue that the fifth claim for constructive trust and sixth claim for
5 accounting are procedurally improper, because constructive trust is not a separate claim and there
6 is no basis for an accounting given Microsoft's concession that it seeks only statutory damages.
7 Although Defendants technically are correct that constructive trust is a remedy, rather than a free-
8 standing claim, as a matter of practice constructive trust commonly is pleaded as a separate claim
9 and the Court will not grant summary judgment on this basis. With respect to the sixth claim for
10 an accounting, the Court understands Microsoft's concession to extend only to the first claim for
11 copyright infringement and the second claim for trademark infringement. Microsoft may seek an
12 accounting with respect to its third claim for false designation of origin and fourth claim for
13 unfair competition. Accordingly, the Court will deny Defendants' motion on this basis.

14 Because Chen has established that she personally is entitled to summary judgment with
15 respect to all substantive claims except for copyright infringement, as to which claim Microsoft
16 has limited itself to statutory damages, the Court will grant Chen's motion for summary
17 judgment on the claims of constructive trust and accounting.

18 **G. Scope Of The Remaining Action**

19 In light of the Court's disposition of the parties' cross-motions for summary judgment,
20 the only remaining issues for trial between these parties are the amounts of damages Microsoft is
21 entitled to recover from Suncrest on the claims of false designation of origin and state law unfair
22 competition, and the extent to which the remedies of constructive trust and accounting should be
23 imposed against Suncrest. The Court is aware that Suncrest has a cross-claim pending against
24 M-Plus, but is not aware of the status of this cross-claim.

1 **IV. ORDER**

- 2 (1) With respect to the first claim for copyright infringement, summary judgment is
3 GRANTED for Microsoft against both Suncrest and Chen; statutory damages are
4 awarded in the total amount of \$5,000; costs and attorneys' fees are awarded in an
5 amount not to exceed \$30,000; and permanent injunctive relief is DENIED;
6
- 7 (2) With respect to the second claim for trademark infringement, summary judgment
8 is GRANTED for Microsoft against Suncrest, but GRANTED for Chen against
9 Microsoft; and statutory damages are awarded against Suncrest only in the total
10 amount of \$10,000;
11
- 12 (3) With respect to the third claim for false designation of origin, summary judgment
13 on liability is GRANTED for Microsoft against Suncrest, but GRANTED for
14 Chen against Microsoft; and damages have not been adjudicated;
15
- 16 (4) With respect to the fourth claim for state law unfair competition, summary
17 judgment on liability is GRANTED for Microsoft against Suncrest, but
18 GRANTED for Chen against Microsoft; and damages have not been adjudicated;
19
- 20 (5) With respect to the fifth claim for constructive trust and sixth claim for
21 accounting, summary judgment is GRANTED for Chen against Microsoft; and the
22 propriety of these remedies with respect to Suncrest has not been adjudicated;
23
- 24 (6) The only remaining issues for trial between Microsoft, Suncrest and Chen are the
25 amounts of damages Microsoft is entitled to recover from Suncrest on the claims
26 of false designation of origin and state law unfair competition, and the extent to
27 which the remedies of constructive trust and accounting should be imposed
28 against Suncrest;
- (7) As soon as is practical, the parties shall notify the Court as to the status of
Suncrest's cross-claim against M-Plus; and
- (8) Microsoft shall submit a declaration setting forth its reasonable attorneys' fees
incurred in prosecuting its copyright claim within seven (7) days after service of
this order.

23 DATED: 5/16/06

24 
25 JEREMY FOGEL
26 United States District Judge
27
28

1 This Order has been served upon the following persons:

2
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